No. 83-779

In the Supreme Court of the United States

OCTOBER TERM, 1983

WAYNE LAGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to charge the jury that petitioner was entitled to the defense of entrapment despite the fact that he contended that a private citizen, rather than a government agent, had induced him to commit a crime.

2. Whether delay in bringing petitioner to trial violated his Sixth Amendment right to a speedy trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Constitution, statutes and rule:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 707 F.2d 1209.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21) was entered on June 20, 1983.[1] A petition for rehearing was denied on August 15, 1983 (Pet. App. 20). The petition for a writ of certiorari was filed as of October 31, 1983, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1]The petition states (Pet. 2) that the judgment was entered on September 1, 1983. We believe petitioner has confused the date of entry of the judgment (June 20, 1983, see Pet. App. 21) with the date of issuance of the mandate (September 1, 1983). In any event, under Rule 20.4 of the Rules of this Court, the time within which a petition for writ of certiorari must be filed would run from the date of denial of the petition for rehearing (August 15, 1983).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida petitioner was convicted of possession of methaqualone with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, and with conspiring to possess methaqualone, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 18 months' imprisonment on each count and to a special parole term of two years on the second count. The court of appeals affirmed (Pet. App. 1-19).

1. The evidence at trial showed that in June 1980 an informant told a DEA agent that petitioner's co-defendant Donna Ambrose had offered to arrange a sale of 100,000 methaqualone tablets. The agent and the informant then met Ambrose and petitioner in a Fort Lauderdale motel room to consummate the sale. Tr. 88-89, 105-107. When petitioner asked to see the purchase money before producing the drugs, the agent showed him $74,800 in cash. Petitioner counted the money and asked when the remaining portion of the $100,000 purchase price would be paid. After the agent agreed to pay him the rest of the money later in the day, petitioner left the motel, stating that he would return with the promised drugs at 2 p.m. Tr. 88-91.

Shortly after 2 p.m., petitioner returned to the motel room with co-defendant Leo Morris. Morris negotiated with the agent about the number of tablets to be sold and the selling price. After an agreement was reached, Morris left the motel room, promising to return with the drugs. Tr. 92-93. Morris returned two and a half hours later in a car driven by William Kelley.[2] Kelley told the agent that he had

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[2]Kelley was indicted along with petitioner and his co-defendants. Prior to trial, Kelley pleaded guilty to one count of possession of methaqualone with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

50,000 quaalude tablets in the car. Kelley opened the trunk of the car, took out one cardboard box, and instructed the informant to take the second box. The boxes were brought into the motel room and placed on a bed. Tr. 95-96, 162-163. The agent left the motel room on the pretext that he was going to get the purchase money from his car. Instead, he signaled to other DEA agents, who entered the room and arrested Morris, Ambrose and Kelley. Tr. 162-163. An hour later, petitioner was arrested when he returned to the motel (Tr. 163). Laboratory analysis subsequently showed that the boxes Kelley had brought to the motel room contained methaqualone tablets (Tr. 164, 235-243).

2. On June 30, 1983 — 12 days after petitioner's arrest —a grand jury returned an indictment against petitioner, Ambrose, Morris, and Kelley, charging them with possessing a controlled substance with intent to distribute. Trial was set for September 16, 1980 (R. 74).[3] Defense counsel requested several continuances because of conflicts among their schedules (III PR 101, 106, 107, 110, 113). The district court granted these requests and continued the case to February 18, 1981. The government then sought a continuance because its chief witness, the DEA agent, had been transferred overseas and was unavailable to testify on the date set for trial (Pet. App. 22). The court granted a continuance to March 9, 1981. When the government sought a second continuance because the agent was still unavailable the district court on March 6, 1981, sua sponte dismissed the case without prejudice (III PR 112, 115; Pet. App. 22).

On April 6, 1981, a grand jury returned a second indictment against petitioner and his co-defendants. Prior to trial, petitioner moved for dismissal of the second indictment, claiming that trial on that indictment would violate

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[3] "R." refers to the record on appeal. "PR" refers to the record in *United States v. Ambrose*, No. 80-6060, the case arising from the original indictment of petitioner and his co-defendants.

his Sixth Amendment right to a speedy trial. The district court denied the motion (R. 162; Tr. 267). Trial began on June 24, 1981 (Pet. App. 16).

At trial, Ambrose testified that the informant had asked her to find a source for the illegal drugs. Ambrose claimed the informant told her he needed the drugs urgently in order to appease a New York Mafia figure who was demanding them. According to Ambrose, the informant ignored her claim that she could do nothing to help him and claimed that his life was at stake. Ambrose testified that at one point the informant threatened her with a gun. Tr. 294-313. Ambrose stated that she called petitioner to tell him of her predicament and to beg him to help her find a source for the drugs to satisfy the informant.

At trial, petitioner denied knowing the source of the tablets seized at the motel and claimed that he had accompanied Ambrose to the motel to protect her from the informant and the "New York Mafia man" (Tr. 313, 364, 392). Petitioner also claimed he had been entrapped by the informant, even though the latter had not directly induced him to commit the crime. The trial court refused petitioner's request that the jury be instructed that indirect inducement could legally constitute entrapment,[4] but did give a general

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[4]Petitioner requested the following charge (Pet. App. 10):

> You are instructed that a person may be brought into a criminal scheme after being informed indirectly of conduct or statements by a government agent which amount to an inducement, and that person is then able to avail himself or herself of the defense of entrapment, just as the person who receives the inducement directly.
>
> You are further instructed that you may find that a person who received inducement indirectly may have been entrapped even if you find that the person who received the inducement directly was not entrapped.

charge on entrapment (Pet. App. 8-9). Rejecting the entrapment defense, the jury convicted both Ambrose and petitioner.

3. On appeal, petitioner claimed that the trial court erred in refusing to instruct the jury expressly that a defendant is entitled to the defense of entrapment if he is induced to commit the crime after being informed indirectly of the statements of a government agent. The court of appeals held that the trial court's refusal to give such an instruction was correct because " '[a] defendant cannot avail himself of an entrapment defense unless the initiator of his criminal activity is acting as an agent of the government' " (Pet. App. 11-12, quoting *United States* v. *Mers*, 701 F.2d 1321, 1340 (11th Cir.), cert. denied, Nos. 83-73 and 83-5083 (Nov. 28, 1983)). The court of appeals noted that petitioner "may have obtained a better charge * * * than [he was] entitled to," since the charge given "in no way directly limit[ed] the entrapment defense to the one person to whom the [informant] communicated directly" (Pet. App. 12, 13).[5]

Petitioner also contended on appeal that the district court's refusal to dismiss the second indictment violated his Sixth Amendment right to a speedy trial. Petitioner claimed prejudice from the delay on the ground that the government had been unable to locate the informant at the time of trial. The court of appeals rejected petitioner's claim (Pet. App. 15-18). Applying the standards set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972), it noted that petitioner's trial had begun within a year and a week after the filing of the first indictment and that dismissal of the first indictment

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[5]The court of appeals rejected Ambrose's claim that the government failed to rebut adequately the evidence she offered in support of her claim of entrapment (Pet. App. 13). This Court recently denied Ambrose's petition for a writ of certiorari in which she challenged the court of appeals' holding on that point. *Ambrose* v. *United States*, No. 83-5595 (Nov. 14, 1983).

was not on the government's motion, "thus obviating any suggestion that the government was attempting to start the time limits running anew after some default by it by dismissing the first indictment" (Pet. App. 16). The court of appeals concluded that the delay was neither lengthy nor without reason and that petitioner could not be said to have been prejudiced by it, since he had not shown what favorable testimony the informant reasonably could have been expected to give had he been available to testify (*id.* at 17-18).[6]

ARGUMENT

1. Petitioner contends (Pet. 12-18) that the trial court erred in refusing to give the jury his requested charge on entrapment and that the court of appeals' holding that petitioner was not entitled to such an instruction as a matter of law conflicts with the holding of the Second Circuit in *United States* v. *Valencia*, 645 F.2d 1158 (1980).

The court of appeals correctly concluded that in the circumstances of this case petitioner was not entitled to the defense of entrapment. The court applied the well-established principle that entrapment cannot result from the inducements of a private citizen, but must be the product of conduct by government agents. See, *e.g.*, *United States* v. *Mers*, 701 F.2d 1321, 1340 (11th Cir.), cert. denied Nos. 83-73 and 83-5083 (Nov. 28, 1983); *United States* v. *Perl*, 584 F.2d 1316, 1320 & n.1, 1322 n.5 (4th Cir. 1978), cert. denied, 439 U.S. 1130 (1979); *United States* v. *Garcia*, 546 F.2d 613, 615 (5th Cir.), cert. denied, 430 U.S. 958 (1977); *United States* v. *Reed*, 526 F.2d 740, 743 (2d Cir. 1975), cert. denied, 424 U.S. 956 (1976); *United States* v. *Mayo*, 498 F.2d 713, 716 (D.C. Cir. 1974); *United States* v *Sanchez*, 440 F.2d 649, 650 (9th Cir. 1971). Petitioner's

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[6]The court of appeals also held that the trial court did not err in its handling of a request for information and the forced presence of the informant (Pet. App. 14-15) and that the trial court did not err in denying a motion to suppress (*id.* at 18-19).

claim of entrapment rested entirely on his contention that Ambrose had told him about threats made against her by the informant and that he acted out of fear for her safety. There was no direct contact between petitioner and any government officer or agent at the time of the alleged inducements. Nor can petitioner contend that the government should reasonably have expected that any inducements directed to Ambrose would be communicated to petitioner. Thus, there is no basis for a finding that petitioner was in any way a target of the alleged government solicitations.

The facts of this case distinguish it from *United States* v. *Valencia, supra*. In *Valencia*, the Second Circuit stated (645 F.2d at 1168) that "[i]f a person is brought into a criminal scheme after being informed indirectly of conduct or statements by a government agent which could amount to inducement, then that person should be able to avail himself of the defense of entrapment * * *." But that case involved a husband and wife and a government agent who was aware that they lived together and were experiencing financial difficulties. In addition, the government agent had made frequent visits to the defendants' apartment while both were at home and allegedly had continually pushed and coerced the wife to sell cocaine during those visits. In those circumstances, the government arguably should have known that inducements directed to the wife would be conveyed to the husband. Here, there was no known connection between petitioner and Ambrose that would have led the government to suspect that petitioner would have been influenced by communications between the informant and Ambrose.

In any event, as the court of appeals noted (Pet. App 12, 13), the instruction given by the trial court did not limit the entrapment defense to Ambrose, so that the charge in fact was "a broader charge than [petitioner was] entitled to have

given to the jury.'"[7] Nor did the trial court preclude petitioner from arguing that he had been entrapped. Thus, petitioner was not prejudiced by the trial court's refusal to give the requested entrapment instruction. The court of appeals correctly determined that, in light of these circumstances, it was not required to reach the "precise" question whether those who have established "by undisputed evidence that they have been brought into * * * a [criminal] plan by a plea for help by their close friend, who told of threats against her life, would be entitled to a jury trial on the issue of entrapment" (Pet. App. 13-14). Moreover, since

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[7]The trial court gave the following instruction on entrapment (Pet. App. 8-9):

> Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officer[s] or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.
>
> On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is not entrapment. For example, it is not entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to engage in an unlawful transaction.
>
> If then the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the Defendant was ready and willing to commit a crime such as charged in the indictment, whenever opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then the jury should find that the Defendant is not a victim of entrapment.
>
> On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the Defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the Government, then it is your duty to find him not guilty.

the jury in convicting Ambrose rejected her direct entrapment defense, it is as a practical matter virtually inconceivable that the instruction petitioner requested could have altered the verdict in his case. To the extent there may be a disagreement among the circuits concerning whether a defendant may avail himself of an entrapment defense when he does not claim he was the direct recipient of inducements by a government agent, the present case does not provide an appropriate occasion for this Court to address it.

2. Petitioner also contends (Pet. 18-22) that the delay between his arrest and his trial violated his Sixth Amendment right to a speedy trial. That contention lacks merit.

The court of appeals tested petitioner's speedy trial claim against the standards set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972).[8] It concluded that the delay from the time petitioner was first indicted until he was tried (approximately one year and one week) was not inordinate, that there was an adequate reason for the delay, and that petitioner made no showing of prejudice except to point out that at the time of trial the government was unable to locate the informant. Since petitioner was unable to show what favorable testimony the informant would have given if he had been located, the court concluded that it would be "sheer speculation * * * for us to hold that the defendant had made a showing of prejudice to meet the *Barker* test" (Pet. App. 18).

Petitioner disputes only the court of appeals' finding that he did not show prejudice as a result of the unavailability of the informant. Petitioner apparently believes (see Pet.

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[8]In *Barker* v. *Wingo*, 407 U.S. at 530, the Court listed the following factors to be applied in deciding whether a defendant's Sixth Amendment right to a speedy trial has been violated: (a) length of delay; (b) reason for the delay; (c) defendant's assertion of his right; and (d) prejudice to the defendant.

19-20) that since the informant did not testify the court of appeals must assume that he would have testified that he threatened to harm Ambrose if she did not assist him in obtaining illegal drugs for a New York Mafia figure. But the court of appeals was not required to draw such a conclusion. Ambrose's story was simply not credible. For example, she acknowledged that although she was in a public bar near a police station when the informant allegedly threatened her with a gun, she did not seek help; instead she gave the informant a ride home from the bar that evening because he did not have a car (Tr. 299, 355). Moreover, petitioner's testimony that he assisted Ambrose in locating a source for the drugs because he believed her life was in danger was also incredible. Even though he claimed to have believed Ambrose's life had been seriously threatened by the informant, petitioner admitted that he left her at the motel with the informant and "the New York Mafia man" for four hours because he had to go to work (Tr. 392, 399). Petitioner's contention that the court of appeals erred in concluding that he had failed to show prejudice from the absence of the informant at trial does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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